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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 919

IRVING W. POWLESS,

Petitioner,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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No.

IRVING W. POWLESS,

Petitioner,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above case on the 21st day of October, 1965.

Opinions Below

The determination of the State Tax Commission is appended to this Petition in the Appendix at page 1a. The Opinion of the Appellate Division, Third Department is reported at (22 A.D. 2d 746). The Court of Appeals affirmed without opinion the order of the Appellate Division.

Jurisdiction

The judgment of the New York Court of Appeals was made and entered on October 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

The questions presented are:

1. Is a tribal Indian, member of the Onondaga Indian Nation and the Six Nations Indian (Iroquois) Confederacy living on the Onondaga Reservation in the State of New York a resident of New York State for purposes of the personal income tax imposed by the State?

2. If a resident of New York State, is he subject to New York State personal income tax on his entire net income?

The New York State Tax Commission answered both questions in the affirmative. This was confirmed by the Appellate Division, Third Department and affirmed by the Court of Appeals of the State of New York.

Treaties and Constitutional and Statutory Provisions Involved

Sections 1 (2) and 1 (8) of the United States Constitution

Section 2 of the 14th Amendment to the United States Constitution 25 U.S.C. #177, 232, 233

U. S. Treaties with the Six Nations Indian Confederacy and the Onondaga Nation dated October 22, 1784, January 9, 1789 and November 11, 1794, *7 Stat. 15, 33, 44.*

Tax Law of the State of New York, Article 16.

Statement

The facts herein are not in dispute; they were stipulated as follows:

"1. The taxpayer, an Indian, is and has always been a member of the Onondaga tribe. During all of the year 1959 he resided on the Onondaga Reservation at R.D. #1, Nedrow, New York, together with his wife, Cecilia, and his son, Everett. In the years prior to 1959 the taxpayer also resided on the Onondaga Reservation.

2. During the calendar year 1959 the taxpayer was employed as a mechanic by the Chrysler Corporation in the City of Syracuse, New York, and earned the sum of $5,365.78. During that year, the Chrysler Corporation withheld from the taxpayer's wages New York State personal income tax in the amount of $126.37.

3. During the month of May, 1961, the taxpayer filed with the State Tax Commission a New York State resident income tax return on short form IT-200, under protest, and with said return, filed a claim for refund on the entire amount of $126.37 which had been withheld from his wages as aforesaid. The ground for such claim, as stated therein, was that the taxpayer is not subject to New York State personal income taxation and that Section 351 of the New York State Income Tax Law is invalid and unconstitutional insofar as it attempts to place a tax upon income earned by a member of an Indian nation residing on a reservation in the State of New York.

4. By letter dated May 22, 1961, the State Tax Commission allowed a refund in the amount of $32.87, but denied a refund of the balance claimed, amounting to

$93.50, on the ground that the compensation paid to the taxpayer was income taxable under the New York State Personal Income Tax Law. Thereafter, and on or about August 2, 1961, the taxpayer, through his attorneys, Wiggin, Tsapis, Golder and Freeman, filed with the State Tax Commission, a demand for hearing in the form prescribed by said Commission."

At the Hearing in the State Tax Commission on June 5, 1962, the parties stated that they agree to have this case as a test case for other Indian cases. The State Tax Commission determined on October 3, 1963 that Petitioner was a resident of the State of New York and that he was subject to State Income Tax on his entire net income.

A proceeding for a review of this determination was instituted in the Supreme Court of the State of New York which by order dated January 24, 1964 transferred the proceeding to the Appellate Division, Third Department in accordance with the provision of #7804(g) of the Civil Practice Law and Rules. On October 28, 1964, the Appellate Division confirmed the determination of the State Tax Commission. This order of the Appellate Division was affirmed without opinion on October 21, 1965 by the Court of Appeals

Reasons for Granting the Writ

Petitioner had to forego the right to have his case reviewed by appeal pursuant to 28 U.S.C. 1257(2) in order to assume full scope in the Supreme Court to review also his rights, privilege or immunity under the U. S. Constitution and treaties, and the validity of U. S. Treaties with his Indian Nation. The challenge to the Tax Law

of the State of New York is limited to the State's attempt to apply it to Reservation Indians of the Six Nations.

The decision below should be reviewed because without opinion it erroneously affirmed the decision of the Appellate Division, Third Department which relied on State Tax Commission *v.* Barnes, 14 Misc. 2d 311 as its sole authority. The decision of the Appellate Division sought to avoid the difficult constitutional questions arising from the peculiar status of Petitioner who is an incompetent Indian in tribal relations, living on a Reservation and is a member of the Onondaga Indian Nation and the Six Nations Indian (Iroquois) Confederacy. The case cited by the Appellate Division relied erroneously on these class of cases which should have been distinguished from the case at bar:

(A) Cases involving emancipated (competent) Indians.

Choteau v. *Burnet*, 283 U. S. 691 involved an emancipated Indian under the 1906 Allotment Act. This Act granted exemption from taxation to the Indian for twenty five years, and the Indian upon receipt of a Certificate of Competency, under c.3572 (34 Stat. 539) possessed the right to manage, control and dispose of his or her lands the same as any citizen of the United States. He becomes a person subject to taxation, having in fact and in law severed his tribal relations. At page 695, this Court specifically stated that it was not concerned with members who do not have Certificates of Competence. This case simply held that *a competent* Indian, who had unrestricted control over lands and income therefrom, was not exempt from income tax solely because of his status as Indian. The case began as three companion cases in 38 F. 2d

976 (10 Cir.), 1930, *Blackbird, Pettit* and *Choteau.* In the *Blackbird* case, the Court held that a restricted full-blood Osage Indian was not liable for income tax. In the *Pettit* case the Court held that a white woman inheriting from children, members of the Osage tribe, lands allotted to them under statute was liable for income tax on royalties and bonuses on mineral deposits. Both *Blackbird* and *Pettit* cases were not appealed or disturbed. The *Choteau* case held that a member of Osage tribe receiving certificate of competency was liable for income tax. The three cases were argued and submitted together but were different in their facts. This is clearly stated in *Big Eagle* v. *U. S.,* 300 F. 2d 765 (1962), (Footnote 2, page 766). And at page 768 the Court in interpreting *Choteau* v. *Burnet,* stated

> The Supreme Court said that (Revenue Act) does not expressly exempt the sort of person having petitioner's status which was that of a competent Indian, who, since receipt of his certificate of competence, had been taxable * * * The decision is clearly bottomed upon the fact that this Indian had achieved emancipation. *Blackbird* was neither overruled nor modified by *Choteau.*

The same conclusion was reached by *Squire* v. *Capoeman,* 531 U. S. 1 (1956), (Footnote 19, page 9) and *Nash* v. *Wiseman,* 227 F. S. 552, 554 (1963).

(B) Cases involving Allotment Statutes.

To encourage the Indian to sever his tribal relations, various treaties and special Acts of Congress have provided for allotment of lands to individual Indians, which lands were ultimately to become their personal property. These Indians were required to sever their tribal relations,

live on their allotments and adopt the life and habits of the "civilized white man". E.g. Treaty of September 27, 1830 with Choctaw Indian Nation, 7 Stat. 333, and the Dawes Act of February 8, 1887, 24 Stat. 388, as amended in 1901, 31 Stat. 1447. The Dawes Act provided for allotment of lands in severalty to Indians and conferred citizenship on the allottees. Congress definitely made such citizen Indians allottees subject to the laws and governmental authority of the states in which they live, and extended to them all the privileges and immunities of citizens in their respective states. The allotment cases are regulated by the specific allotment statutes as interpreted by the Courts. In these cases, the allotment acts provide for exemption from taxation for certain periods, division of tribal lands, allotment, certificates of competency and complete emancipation of the Indian who ceases to be an Indian in the eyes of the law upon compliance with the requirement of the Act.

(C) Cases involving Federal Income Tax.

In the leading case of *Choteau* v. *Burnet, supra,* which involved Federal Income Tax, the Court said at page 696, citing *Gillespie* v. *Oklahoma,* 257 U. S. 501 (1922) and *Shaw* v. *Oil Corp,* 276 U. S. 575 (1928), that even though the income received was subject to Federal Income Tax, it was beyond the taxing power of the State to tax it. *U. S.* v. *Rickert,* 188 U. S. 432 (1903), is not overruled or departed from. In this case it was held that property held in trust by the United States for Indian allottees were not subject to State taxes without the consent of Congress. *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598 (1943) cites but does not overrule *U. S.* v. *Rickert, supra. Oklahoma Tax Commission* v. *United*

States, supra, involved an interpretation of an Oklahoma Statute which subjected to taxation "all transfers of estates". This case should be examined with the discussion in *United States* v. *Oklahoma Tax Commssion,* 131 F. 2d 635 (1942) and *Childs* v. *Beaver,* 270 U. S. 555 (1926).

(D) Cases involving non-Indians and other citizens.

The *Mountain Producers* case, 303 U. S. 376 (1938), involved a tax upon the income of an oil and gas lessee of state lands, and it stands for the rule that the interest of the lessee is too remote to be protected from the levy under the rule exempting state instrumentalities from federal taxation. In this and other cases, the Indian was not involved but it was the white lessee who wanted to extend the exemption to him.

(E) Cases involving Oklahoma Indians.

This Court in *Oklahoma Tax Commissioner* v. *U. S. supra,* has specifically stated that Oklahoma Indians are anomalous. A case involving Oklahoma Indians does not necessarily apply to New York Indians. This Court stated in *Oklahoma Tax Commission* v. *U. S. supra,* at page 603 that Oklahoma Indians "Although they are remnants of the form of tribal sovereignty, these Indians have no effective tribal authority as in *Worcester* v. *Georgia, supra,* and unlike the Indians involved in the *Kansas Indians, supra,* they are actually citizens of the State with little to distinguish them from all other citizens except for their limited restrictions and their tax exemptions." In contrast, the status of the New York Indians has been settled in the case of *New York Indians,* 5 Wall. 761. Furthermore, there is significant difference between

the activities and power of the Oklahoma Indians in the State of Oklahoma as compared with New York Inndians. This is described in *Board of County Commissioners* v. *Seber,* 130 F. 2d 633, 682.

These additional points were ignored by the Courts below:

A) Indians have always been the object of special legislation.

The case of *Cherokee Tobacco,* 11 Wall. 616, 20 L. Ed. 227, is nullified as a precedent by *U. S.* v. *Forty Three Gallons of Whiskey,* 108 U. S. 491, 494 (1882). Not only general statutes do not apply to Indians unless they specifically so provide, amendments to the U. S. Constitution were held not applicable to Indians. *U. S.* v. *2,005.32 Acres,* 160 F. S. 193 (1958), *Elk* v. *Wilkings,* 112 U. S. 94, *U. S.* v. *Rickert,* 188 U. S. 432, *Lewelleon* v. *Colonial Trust Co.,* (3rd Cir.) 17 F. 2d 36 (1927), *McCandless* v. *U. S.,* (3rd Cir.) 25 F. 2d 71 (1928), *Ex Parte Dog Crow,* 109 U. S. 556 (1883). *Talton* v. *Mayes,* 163 U. S. 376 (1895), *Toledo* v. *Pueblo De Jemez,* 119 F. S. 429 (1954), *Native American Church* v. *Navajo Tribal Counsel* (10th Cir.), 272 F. 2d 131 (1959), *Glover* v. *U. S.* 219 F. S. 19 , DC Montana (1963).

(B) State Laws do not apply to Tribal Indians without specific authorization by Congress.

This point is accepted in the Opinion of New York Attorney General, 1915, Vol. II, which was cited with approval in *U. S.* v. *Hamilton,* 233 F. 685 (1915).

In the Senate Report No. 1137, 80th Congress, 2nd Session, 1948, it was stated that "state law does not apply to Indians except so far as the United States has given its consent." This is in line with decisions in *U. S.* v. *Forness,* 2nd Cir. 125 F. 2d 928 (1942), *cert. denied* 326 U. S. 496 and *Lee* v. *Ganoda Trading,* 358 U. S. 217 (1958).

(C) Indians residing on reservation are not resident of New York State.

This Court in *Kennedy* v. *Becker,* 241 U. S. 556 (1915) made a distinction at page 560 between Indian Reservation on which the Senecas reside and New York State territories. Indians are ruled in the Opinion of the New York State Attorney General in 1928 at page 206 not to be counted in apportioning congressman to the State (U. S. Constitution Art. 1 #3: Amend XIV #2) and in the Opinion of the U. S. Attorney General, 1940 "Exclusion of Indians not Taxed When Apportioning Representatives." In *Allen* v. *Merrell,* the Supreme Court of Utah, 305 P. 2d 490 (1956) held that an Indian living on a reservation is not deemed a resident of Utah. The conferring of U. S. citizenship on Indians did not change their constitutional relationship with the Federal Government. *U. S.* v. *Nice,* 241 U. S. 591 (1915), *U. S.* v. *Dewey County,* 14 F. 2d 784 (1926), affirmed 26 F. 2d 434 (1928); *U. S.* v. *Holliday,* 3 Wall, 407, 419, *U. S.* v. *Gardner,* 189 F. 690 (1911), *U. S.* v. *Sandoval,* 231 U. S. 28 (1913), 48 *U. S.* v. *Boble,* 237 U. S. 74, 79 (1915), *Winton* v. *Amos,* 255 U. S. 373 (1921) and *U. S.* v. *Logan,* 105 F. 240, 241.

(D) Lack of Federal Authority to support the State's Power to impose the tax.

New York State cannot use the Civil and Criminal Jurisdiction Statutes as a vehicle to impose State taxation on the Indian Reservations. New York Civil and Criminal jurisdiction were extended to Indians by express Acts of Congress, 25 U.S.C. #232, 233. No Congressional Act has authorized the State of New York to tax Six Nations Indians. *U. S.* v. *Quiver,* 241 U. S. 602, at page 606, held

that there must be some clear provision to justify the application of State laws to Indians. Also *Iron Crow* v. *Oglala,* 231 F. 2d 8th Cir. 89, 94 (1956), *U. S.* v. *U. S. Fidelity and Guaranty Co.,* 309 U. S. 506 (1939). Re Carmen's Petition, 165 F. S. 942, 948 (1958), *U. S.* v. *Dewey County,* 14 F. 2d 784, 788 (1926) certiorari denied, 278 U. S. 649.

(E) New York State lacks power to tax Six Nations tribal Indians.

1) The treaties between the United States and Six Nations and the Onondaga Nation inhibit the State from taxing these tribes, and define the Reservations as the property of these tribes and not as part of New York State. 7 Stat. 15, 33, 44, *Bryan County* v. *U. S.,* 123 F. 2d 782 (1941).

2) The power of taxation still exists in tribal governments, and the power to levy taxes is an inherent attribute of tribal sovereignty. *Iron Crow* v. *Oglala, supra, Barnes* v. *United States, D. C. Montana,* 1962, 205 F. S. 97, *Morris* v. *Hichcock,* 184 U. S. 384 (1904), *Buster* v. *Wright,* 135 F. 947, 8 Cir. (1905), app. dismissed, 203 U. S. 99 (1906) and *Childes* v. *Beaver,* 270 U. S. 555.

3) New York tribal Indians are still wards of the Federal Government. This is determined in the case of *Boylan* v. *U. S.* 256 F. 468, 265 F. 165, app. dism. 257 U. S. 614. *U. S.* v. *Kagama,* 118 U. S. 375 (1886), *Fellows* v. *Blacksmith* 19 How. 366 and *Seneca Nation of Indians* v. *Appleby,* 196 N. Y. 318.

The questions presented by this case are of great and recurring significance in the lives of these tribal Indians. At no fault of their own, their legal status and their

rights, privileges and immunities in the State of New York became a source of many contradictions and ambiguities on the state and federal levels. The State of New York has adopted an attitude laid down by its Attorney General and urged upon the two lower Courts by respondent that "New York Indians have been legally assimilated into the polity which is the 'People of the State of New York' on these grounds:

1) Their treaty-making power has been abolished

2) They have been made citizens

3) They have been made subject to the criminal and civil jurisdiction of the State of New York"

The important nature of these issues has already beeen recognized by this Court as recently as *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U. S. 685 (1965). The serious effect of the decision below, if unreversed, upon the historic rights of these Indians under the United States Constitution, United States treaties and Statutes is unparalleled in the history of this Nation, and will have far reaching consequences.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition of Certiorari should be granted.

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New York, New York 10038

APPENDIX

I

DETERMINATION OF STATE TAX COMMISSION

In the Matter of the Application
of
IRVING W. POWLESS
For a Refund of Personal Income Taxes Under
Article 16 of the Tax Law of the Year 1959

A personal income tax return pursuant to Article 16 of the Tax Law having been filed by the taxpayer herein for the calendar year 1959; an application for refund of the income tax paid for that year having been filed on the ground that the taxpayer is not subject to New York State personal income taxation and that section 351 of the Tax Law is invalid and unconstitutional insofar as it attempts to place a tax upon income earned by a member of an Indian nation residing on a reservation in the State of New York; said application having been denied and a timely demand for hearing having been filed; a hearing pursuant to section 374 of the Tax Law having been held at the office of the State Tax Commission at the Gov. Alfred A. Smith State Office Building, Albany, New York, on June 5, 1962 before Arvis A. Johnson, Hearing Officer; an appearance on behalf of the taxpayer at said hearing having been made by Walter J. Wiggins, Esq., and Norman D. Freeman, Esq., of Wiggins, Tsapis, Golder & Freeman, Esqs.; a stipulation of facts, dated May 3, 1962, by and between the State Tax Commission and the above named taxpayer, by their duly authorized

attorneys, having been introduced in evidence at the hearing; the matter having been considered by the State Tax Commission;

The State Tax Commission hereby finds, in accordance with the stipulation of facts, dated May 3, 1962, referred to above:

1. The taxpayer, an Indian, is and has always been a member of the Onondaga tribe. During all of the year 1959, he resided on the Onondaga Reservation at R.D. #1, Nedrow, New York, together with his wife, Cecilia, and his son, Everett. In the years prior to 1959, the taxpayer also resided on the Onondaga Reservation.

2. During the calendar year 1959, the taxpayer was employed as a mechanic by the Chrysler Corporation in the City of Syracuse, New York, and earned the sum of $5,365.78. During that year, the Chrysler Corporation withheld from those wages New York State personal income tax in the amount of $126.37.

3. In May 1961, the taxpayer filed with the State Tax Commission a New York State resident income tax return on Short Form IT-200, under protest, showing a total income of $5,365.78, the amount received in 1959 from the Chrysler Corporation as compensation. With said return, the taxpayer filed a claim for refund of the entire amount of $126.37 which had been withheld from his wages as aforesaid.

4. By letter dated May 22, 1961, a refund in the amount of $32.87 was allowed by the State Tax Commission, but a refund of the balance claimed amounting to $93.50 was denied on the ground that the compensation paid to the taxpayer by his employer was income taxable under the New York State Personal Income Tax Law.

Upon the foregoing, the State Tax Commission

DETERMINES:

1. Pursuant to section 350, subdivision 7 of the Tax Law, the taxpayer was a resident of the State of New York for the year 1959 for purposes of the personal income tax imposed by Article 16 of the Tax Law because, in 1959, he was domiciled in the State of New York and maintained a permanent place of abode within New York.

2. Pursuant to section 351 of the Tax Law, as a resident of New York State the taxpayer was subject to tax upon his entire net income.

3. The application for refund with respect to the taxes of $126.37 withheld was properly granted to the extent of $32.87, the sum refunded being that amount of tax withheld by the Chrysler Corporation which was in excess of the tax due as shown by the taxpayer's 1959 return.

4. The application for refund with respect to the balance amounting to $93.50 was properly denied because the taxpayer was subject to tax under Article 16 of the Tax Law and $93.50 was the tax properly due.

5. No payment of personal income taxes has been illegally made or exacted for the year 1959.

Dated: Albany, N. Y., October 3, 1963

THE STATE TAX COMMISSION

JOSEPH H. MURPHY,
Commissioner

IRA J. PALESTIN,
Commissioner

JAMES R. MACDUFF,
Commissioner

II

ORDER OF THE APPELLATE DIVISION

NEW YORK SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

Present: Hon. James Gibson, Presiding Justice,
Hon. J. Clarence Herlihy,
Hon. Donald S. Taylor,
Hon. Felix J. Aulisi,
Hon. Herbert D. Hamm,
Associate Justices

In the Matter of the Application

of

IRVING W. POWLESS,

Petitioner,

against

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

Pursuant to Article 78 of CPLR and Sections 199 and 200 of the Tax Law.

This proceeding for a review pursuant to the provisions of Article 78 of the CPLR of the final determination of the respondent dated October 3, 1963, entitled "In the Matter of the Application of Irving W. Powless, for a Refund of Personal Income Taxes under Article 16 of the Tax Law for the year 1959," having been transferred to a term of this Court for disposition pursuant

to CPLR #7804(g) by an order of the Supreme Court, Albany County Special Term, dated January 24, 1964, and having duly regularly come on to be heard before this Court on the petition of Irving W. Powless, dated December 23, 1963, and the respondent's answer and return thereto verified January 27, 1964, and Omar Z. Ghobashy, Esq., attorney for the petitioner, having argued in support of the petition, and Julius L. Sackman, Principal Attorney, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent, having argued in opposition thereto, and due deliberation having been had thereon, it is hereby

ORDERED that the determination of the respondent be, and the same hereby is, confirmed, without costs.

The memorandum of decision, dated October 28, 1964, is referred to herewith:

Enter:

/s/ JOHN J. O'BRIEN,
Clerk.

Entered: November 2, 1964
A True Copy.
/s/ JOHN J. O'BRIEN
Clerk.

III

DECISION OF THE APPELLATE DIVISION

[SAME TITLE]

Per Curiam

This is proceeding pursuant to CPLR Article 78 transferred, after a hearing before the State Tax Commission, in accordance with CPLR #7804.

It was stipulated as follows: The petitioner, an Indian, is and has always been a member of the Onondaga tribe. During all of the year 1959 and prior thereto he resided on the Onondaga Reservation. During the calendar year 1959 he was employed as a mechanic by the Chrysler Corporation in the City of Syracuse, New York. During that year the Chrysler Corporation withheld from his wages New York State personal income tax in the amount of $126.37. The petitioner sought a refund. The State Tax Commission allowed a refund in the amount of $32.87 but denied a refund of the remainder amounting to $93.50, on the ground that the compensation paid to the taxpayer was income taxable under the New York State personal income tax law.

In State Tax Commission v. Barnes, 14 Misc. 2d 311, it was held, and we think correctly, that St. Regis Indians living on a reservation were subject to state income tax on income derived from wages. The petitioner here, regardless of his status as a tribal member, was under no statutory restriction as to employment and his earnings did not differ from those of any other resident of the State of New York.

Determination confirmed, without costs.

Gibson, P. J., Herlihy, Taylor, Aulisi and Hamm, JJ., concur.

IV

No. 513

No. 513.

In the Matter of the application of
IRVING W. POWLESS,

Appellant,

vs.

THE STATE TAX COMMISSION OF
THE STATE OF NEW YORK,

Respondent.

BE IT REMEMBERED, That on the 28th day of December in the year of our Lord one thousand nine hundred and sixty-four, Irving W. Powless, the appellant—in this cause, came here unto the Court of Appeals, by Omar Z. Ghobashy, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The State Tax Commission of the State of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Omar Z. Ghobashy, of counsel

for the appellant—, and by Mr. Julius L. Sackman, of counsel for respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeals and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, October 21, 1965.

SEAL OF THE COURT OF APPEALS
OF THE STATE OF NEW YORK

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

No. 513

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of October in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS, The Hon. CHARLES S. DESMOND, Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur—October 21, 1965